

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**DC. CRIMINAL APPEAL NO. 38 OF 2021**

**GIDUJA S/O NKWABI @ MADAHA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

(Appeal from the decision of the District Court of Nkasi at Namanye)

(B. B. Nkomola, RM)

Dated 24<sup>th</sup> day of March 2021

In

Economic Crimes Case No. 8 of 2020

**JUDGMENT**

17/05 & 13/06/2022

**NKWABI, J.:**

The trial court was satisfied with the allegations of the respondent against the appellant that on 27<sup>th</sup> day of April, 2020 at Mashete village, within the trial court's jurisdiction, the appellant was in unlawful possession of government trophies contrary to section 86(1) and (2) (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, [Cap. 200 R.E. 2019]. The government trophies that were seized by the Game Wardens, are two Elephant tusks valued at USD 15,000 equivalent to T.shs. 34,702,500/=.

Through the testimonies of five witnesses and five exhibits the respondent secured home a conviction and a sentence of twenty years imprisonment against the appellant. The appellant was unimpressed. He lodged with this court an appeal which involves a petition of appeal having six grounds of appeal.

Among the six grounds of appeal, are two grounds of appeal to the effect that the appellant was convicted on a case that was not proved beyond reasonable doubt because the evidence adduced at the trial was not cogent.

When the appeal was called up for hearing, the appellant appeared in person fending for himself on the one hand while Ms. Marietha Maguta, learned State Attorney, appeared for the respondent on the other hand.

Arguing his appeal, the appellant urged me that the evidence against him was not cogent to ground conviction. Secondly, he contended that the trial court did not consider his defence. He stressed, circumstantial evidence was insufficient to convict him. He urged me to consider all his grounds of appeal.

In rebuttal arguments, Ms. Maguta clearly intimated that they resist the appeal, as such they support the conviction and sentence.

Arguing the 2<sup>nd</sup> ground of appeal, in respect of his defence, Ms. Maguta was of the firm view that the trial magistrate considered the defence of the appellant. As such, she urged that the ground of appeal be found unmerited.

Regarding the 6<sup>th</sup> ground of appeal, Ms. Maguta contended that that ground of appeal has no merit because there was no procedural irregularity. She prayed me to dismiss it.

Finally on 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> ground of appeal, Ms. Maguta opined that they had 5 witnesses. PW1 and PW2 testified on how they arrested the appellant with the ivory. Appellant did not cross-examine PW1 and PW2 backing her argument with **Athuman Rashid V. Republic Criminal Appeal No. 264/2016 Court of Appeal of Tanzania at Tanga** (unreported) but available on Tanzlii at page 9. She is further of the view that, that evidence is supported by the evidence of PW4. She cited **Jamari Msombe & Another V. Republic Criminal Appeal No. 28/2020** (Court of Appeal of

Tanzania) at page 27 which acknowledges the capacity of Game Warden to support her argument.

There is also the caution statement of the appellant, Ms. Maguta pointed out. The appellant did not cross examine the recorder. She further argued that there was no any misdirection on the part of the trial court. She prayed the appeal be dismissed for lack of merit.

While closing the submissions, the appellant urged the court consider his grounds of appeal.

I have carefully considered this appeal, and I am of the view that this appeal has merit. In the circumstances, with respect, I do not buy the arguments of Ms. Maguta, learned State Attorney for the respondent.

I will start commenting on the caution statement. The appellant, according to the prosecution witnesses, was arrested on 27<sup>th</sup> April 2020 at around 2300 hrs. According to the caution statement which was admitted as exhibit P4, it was recorded by PW3 Kuleba on 29<sup>th</sup> April 2020 starting at 0800 hrs. That is

clearly outside the legally prescribed time for such interview and recording of a caution statement. In accordance to the case of **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** (C.A.T.) torture may be inferred. The caution statement is therefore legitimate to be expunged from the court record. I proceed to expunge it.

The next complaint for my consideration and determination is that the case was not proved beyond reasonable doubt, lodged by the appellant. This complaint finds credence to me. That is because, there is grave contradiction between the testimonies of the witnesses who arrested the appellant. PW1 Abdalla, a Game Warden who arrested the appellant in collaboration with PW2 namely Emmanuel, also a Game Warden had these to say in his testimony in the trial court:

PW1:

*"That we saw the seller who came to us, that the accused was the seller who came to us purposely to sell tusks but he was in the absence of the said tusks. However, he came to us so as to confirm his business of selling tusks. Later we saw the accused in possession of luggage on his hand ..."*

While PW2 said:

*"We went to the place where buyer and seller of tusks arranged to meet for business. We prepared trap on how to arrest the seller of tusks. We saw the accused person in possession of luggage he approached us with the said luggage ..."*

In the situation like the one above, this court is guided by the decision of the Court of Appeal in **Mohamed Said Matula vs. Republic** [1995] TLR 3 where it was held:

*"In his evaluation of the evidence the learned judge made not a single reference to these inconsistencies and contradictions. Nor did he make any mention of them in his summing up to the assessors. He merely accepted the evidence the evidence of the two children at its face value. That was clearly wrong. He had a duty to consider the inconsistencies and contradictions and try to resolve them if he could."*

In my view, the above contradiction is grave, it is difficult to resolve it. As such, the appellant is entitled to the benefit of doubt because even if his defence is weak, a criminal court cannot convict or support his conviction based on the weakness of his defence, see for instance **Elias Kigadye and**

**Others v R. [1981] TLR 355 (C.A) and Christian s/o Kale and Rwekaza s/o Bernard v R. [1992] TLR 302 (CA).**

I, therefore, accept the appellant's lamentations that he was convicted on a case that was not proved beyond reasonable doubt because the evidence adduced at the trial was not cogent.

Consequently, I find the appeal merited, I allow it. The conviction is quashed and the sentence imposed on the appellant is hereby set aside. The appellant is to be set free from prison unless he is held therein for another lawful cause.

It is so ordered.

**DATED at SUMBAWANGA** this 13<sup>th</sup> day of June 2022.



J. F. NKWABI

**JUDGE**

